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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RALPH COLOMBO,

Plaintiff and Appellant,

v.

NELLIE GAIL RANCH OWNERS  
ASSOCIATION,

Defendant and Respondent.

G050879

(Super. Ct. No. 30-2013-00654987)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Ralph Colombo, in pro. per., for Plaintiff and Appellant.

Neuland, Whitney & Michael, Frederick T. Whitney, Nancy Michael and Jane A. Gaba for Defendant and Respondent.

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This is the second case in which plaintiff Ralph Colombo has attempted to state a cause of action against Nellie Gail Ranch Owners Association (the Association) for damages stemming from its demolition of a barn structure and retaining walls on his property. In the first case, *Colombo v. Nellie Gail Ranch Owners Ass'n* (Dec. 3, 2013, G047332) [nonpub. opn.] (*Colombo Demurrer I*), the Association successfully demurred to the complaint on the ground of res judicata because the complaint sought damages based on the Association's alleged wrongful interference with Colombo's right to construct the barn on his property – the same barn construction placed at issue in earlier litigation between these same parties. In that earlier litigation, the Association obtained an injunction that allowed it to demolish the partially constructed barn and other structures if Colombo failed to complete construction of a residence on the property within a specified period. The Association later carried out that demolition, and was awarded the costs of doing so in accordance with the terms of the injunction.

Because that earlier litigation necessarily established the Association's right to demolish the barn, we affirmed the judgment in *Colombo Demurrer I*, concluding the complaint's inclusion of factual allegations not specifically addressed in the previous case did not undermine the preclusive effect of that earlier judgment. Res judicata applied because the primary issue in both cases was Colombo's right to complete the unfinished construction – or conversely, the Association's right to enter the property and demolish it – and the final judgment in the prior case, which incorporated the award of demolition costs to the Association, constituted a final adjudication of that claimed right. (*Colombo Demurrer I, supra*, G047332.)

In this case, filed six months before our opinion in *Colombo Demurrer I*, Colombo has done the same thing again. He once again seeks to hold the Association liable for damages he allegedly suffered as a result of its demolition of his barn and nearby retaining walls. Again, the specific facts that allegedly made the Association's demolition of the structures wrongful are slightly different than what was alleged in

*Colombo Demurrer I*. However, as we explained in that case, such a difference is not significant in assessing the res judicata effect of a prior judgment. Consequently, the trial court here properly sustained the Association’s demurrer without leave to amend. And because that ruling was sufficient to sustain the judgment entered against Colombo, we need not address his separate attacks on the order granting the Association’s special motion to strike the complaint under the anti-SLAPP law. (Code Civ. Proc., § 425.16.) We affirm the judgment.<sup>1</sup>

## I FACTS

Colombo has been battling the Association over construction on his property for a very long time. Colombo’s plans for construction of a residence, a barn, and retaining walls were approved in 2001. However, progress on that construction was fitful at best, and in 2005, with only the barn structure and some retaining walls partially completed, the Association filed suit for an injunction allowing it to demolish what it believed had devolved into a nuisance. The trial court granted that injunction, and we affirmed it, with modifications, in *Nellie Gail Ranch Ass’n v. Colombo* (Mar. 24, 2008, G038603) [nonpub. opn.] (*Colombo Injunction*). Our modified injunction gave Colombo the right to complete construction of a residence on his property within a specified time frame (and thus also preserve the barn structure and retaining walls), but stated that if he

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<sup>1</sup> Colombo has also asked us to take judicial notice of a first amended complaint he filed in *Colombo v. City of Laguna Hills, et.al.* (Super.Ct. Orange County, 2012, No. 30-2012-00537583). Specifically, he seeks judicial notice of the content of exhibits attached to that pleading, asserting they “provide documentary evidence of facts and propositions that are not reasonable[y] subject to dispute and are relevant in support of the issue raised on appeal.” That request is denied. While this court can take judicial notice of the existence of those exhibits, it cannot take judicial notice of the factual information contained therein. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [“[t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning”].)

failed to do so on time, the Association would have the right to enter the property and demolish the barn and retaining walls. (*Ibid.*)

In 2011, with Colombo's residence still not built, the Association commenced enforcement of the injunction, culminating in the demolition of the barn and retaining walls. The Association thereafter filed motions to recover additional attorney fees as well as the costs of abating the nuisance (i.e., the costs of the demolition), as provided for in the injunction. The trial court granted both motions, awarding the Association approximately \$26,000 in fees and \$110,000 in abatement costs. Colombo did not appeal either of those orders, but did appeal a subsequent order which granted the Association's motion to correct the judgment in the injunction case by adding those fees and costs awards to it. We affirmed the order correcting the judgment. (*Nellie Gail Ranch Owners Ass'n. v. Colombo* (Dec. 3, 2013, G047064) [nonpub. opn.].)

And in June 2011, Colombo filed his complaint in *Colombo Demurrer 1*, seeking damages for the alleged wrongful demolition of his barn. As we explained in our opinion in that case, "Colombo style[d] his complaint as one for damages based on claims of alleged breach of the Association's governing documents, intentional and negligent misrepresentation, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. Each of these claims is based on the same alleged wrongful act: i.e., that in August 2005, the Association 'wrongly imposed' a set of architectural guidelines which thereafter unfairly restricted his right to build a barn on his property." (*Colombo Demurrer 1, supra*, G047332.)

Colombo's complaint in that case alleged that "[b]etween January 2006 and August 2008, Colombo . . . made repeated efforts to obtain approval of his modified barn structure, to no avail. Finally, '[a]s a result of [the Association] denying re-approval of Plaintiff's barn and [the] barn's revision of south wall based on the August 2005 [a]rchitectural [g]uidelines . . . , [his] improvements, including the barn[] structure[,] have been demolished . . . .' (Italics added.) Each of Colombo's damage claims flow[ed] from

the Association's demolition of his barn structure.” (*Colombo Demurrer 1, supra*, G047332.)

“The Association demurred to Colombo's complaint, arguing among other things that the entire complaint was barred by principles of res judicata . . . . In connection with [that] assertion, the Association characterized the entire lawsuit as ‘in essence, a defense to [the] action brought by the Association against Colombo in 2005 . . . . Although Colombo had the opportunity, he failed to raise the arguments asserted in his [c]omplaint as defenses at the trial in the [earlier] matter.’” (*Colombo Demurrer 1, supra*, G047332)

We affirmed the trial court's order sustaining the Association's demurrer without leave to amend. As we explained, “the core issue at the heart of this case is whether the Association had the right to demolish Colombo's barn structure; it is that act of demolition which gives rise to his present damage claims. And it is that precise issue which was actually and necessarily adjudicated in the earlier litigation between these parties, resulting in a judgment that expressly authorized the Association to carry out the demolition if Colombo failed to timely complete construction of a residence on the property.

“The judgment required the Association to give Colombo ‘10 days written notice . . . prior to entering the property to enforce the injunction . . . ,’ and then expressly allowed the Association to seek reimbursement from Colombo of ‘all or some of the reasonable and actual costs of abatement on a properly noticed motion.’ As we have already noted, after the Association completed demolition of the structures on Colombo's property, it did file a motion to recoup its costs, which the court granted. If Colombo believed the Association's demolition of the structures had been wrongful and inconsistent with the terms of the injunction, it was incumbent upon him to assert that point *as a defense to the claim for reimbursement*. The trial court's award of those expenses, which we have affirmed in a separate opinion filed concurrently herewith,

necessarily implied a determination the Association acted appropriately in carrying out that demolition in accordance with the injunction.

“Consequently, because the prior case has resulted in a binding determination of both (1) the Association’s the right to demolish the barn structure in the absence of a timely completed *residential* structure on the property and (2) that the Association carried out that demolition in accordance with the terms of the injunction, Colombo is precluded from asserting herein that the barn’s demolition was wrongful.” (*Colombo Demurrer 1, supra*, G047332.)

In June 2013, six months before we issued our opinion in *Colombo Demurrer 1*, Columbo filed his complaint in this case. The Association demurred to the complaint and moved strike it, and Colombo filed a first amended complaint in January 2014. In his amended complaint, Columbo alleges causes of action for breach of the implied covenant of good faith and fair dealing, trespass to land and destruction of property, conversion, intentional infliction of emotional distress and intentional deceit.

In support of each of those causes of action, Colombo alleges that he made diligent efforts to commence construction of a residence on his property, in accordance with the requirements of the modified injunction affirmed by this court in 2008. And while the Association approved his plans, subject to his obtaining a permit from the City of Laguna Hills (City), Colombo was thwarted in his efforts to obtain that permit. Specifically, Colombo alleges the City first required that he complete construction of retaining walls and a pad for the residence before it would issue the building permit to construct the residence. However, the City “abused its power and took actions which unreasonably delayed [his] construction of . . . retaining walls.” He alleges the City finally issued the permit for construction of the retaining walls in December 2009, but the Association ordered him to halt that construction in May 2010 because its own approvals for the construction of those walls, and for the construction of a residence itself, had expired.

Colombo alleges the Association thereafter refused to renew his approvals for the construction, and instead filed a motion in court for the appointment of a receiver to enforce the modified injunction affirmed by this court. Colombo states the factual basis for that motion was allegedly “contradict[ed]” by a declaration submitted by the City’s Community Development Director, who affirmed that Colombo was not permitted to commence construction of a home on the property until he ““completes the grading and the building pad.”” The motion for a receiver was denied.

However, despite the denial of the Association’s motion, it allegedly proceeded to obtain a demolition permit, and demolished the barn and retaining walls anyway. According to Colombo, the Association violated rights granted to him under the modified injunction when it did so, because it elevated its “internal rules” over those rights, and because it “applied and obtained a permit to demolish[] the structure/improvements on the Property” without ensuring Colombo had a reasonable opportunity to comply with the City’s conditions for issuing a building permit or obtaining a court order authorizing the issuance of the demolition permit.

Colombo alleges “it was the intent of [the Association] to prevent the construction of a residence or other improvements on the Property for so long as [he] had an ownership interest in the Property due to its loathing of [his] project and resulting animus toward [Colombo] himself. In conformity with such intent, [the Association] acted in such a manner as to delay construction; mislead [Colombo] as to the manner in which it interpreted and would allegedly cooperate with [him] in carrying out the terms of the Court of Appeal Order . . . ; mislead [him] into believing that [the Association’s] approved plans for a single-family residence expired and needed re-approval which [the Association] then refused to grant; and disregard [his] rights in order to achieve its ultimate objective of preventing [him] from constructing a residence on the Property by demolishing his improvements in the absence of legal cause and in violation of his property rights.” Further, the Association’s misconduct was “intended to cause [him]

emotional distress in order to force him to abandon his vested right to construct a residence on the Property, or conducted with reckless disregard of the probability that it would result in such emotional distress to [him] in order to achieve the intended result.”

Finally, Colombo alleges that as a result of the Association’s bad faith acts, he suffered the removal of the improvements on his property, including the barn structure, and he estimates the costs of restoring the property to be \$500,000. He also alleges he was forced to sell the property, at a diminished value, in order to pay the debts he incurred as a consequence of the Association’s unlawful conduct. And finally, he allegedly suffered “severe emotional distress.”

The Association again demurred to Colombo’s first amended complaint, and filed a special motion to strike it pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP law). The trial court sustained the demurrer without leave to amend, and granted the special motion to strike. The court subsequently filed a formal “order and judgment.”<sup>2</sup>

## II

### DISCUSSION

Colombo’s appeal challenges the trial court’s order (1) sustaining the Association’s demurrer without leave to amend; (2) refusing to allow additional discovery in connection with the Association’s special motion to strike his complaint under the anti-SLAPP law; and (3) granting the special motion to strike his complaint. He claims that his appeal presents various questions pertaining to whether the Association’s alleged conduct “breached this Court’s Opinion [in the injunction case],” including whether the Association’s failure to “modify or dissolve [the] injunction . . .

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<sup>2</sup> Colombo’s appeal is taken directly from the order sustaining the demurrer without leave to amend and granting the anti-SLAPP motion. Technically, an order sustaining a demurrer without leave to amend is not appealable and such a ruling can be challenged only by appeal taken from a subsequently entered judgment. However, as explained in *Jackson v. Teachers Ins. Co.* (1973) 30 Cal.App.3d 341, 343, “[s]ince the judgments of dismissal were subsequently entered and are part of the record before us, the appeal will be considered on the merits . . . as taken from the subsequent judgments.”



was intended to deprive [him] of complete relief he is entitle[d] to,” and whether the Association “had the right to demand [he] stop construction on June 2, 2010, . . . while issue of construction was a matter of Court’s Jurisdiction.”

### *1. Demurrer Standard of Review*

We conduct a de novo review of the trial court’s order sustaining the Association’s demurrer (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415), and the rules we apply are well settled: “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318.) Leave to amend a complaint “‘should *not* be granted where . . . amendment would be futile.’” (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1100.)

### *2. Res Judicata*

The Association contends that the claims alleged in Colombo’s present complaint, like his complaint in *Colombo Demurrer I*, are barred by the doctrines of res judicata and collateral estoppel. We agree.

“Res judicata, or claim preclusion, is a doctrine which ‘prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity

with them.’ (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Collateral estoppel, or ‘issue preclusion,’ is an aspect of res judicata which prevents ‘relitigation of issues argued and decided in prior proceedings.’ (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) Collateral estoppel is applicable ‘only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.’ (*Ibid.*)” (*Colombo Demurrer 1, supra*, G047332.)

As illustrated by the questions Colombo presents on appeal, the central issue presented in his present complaint, and each of his causes of action, is whether the Association had the right to demolish his partially completed barn structure and retaining walls, in accordance with the terms of the injunction, rather than allowing Colombo to continue with efforts to build a residence on the property. All of the damage he alleges was inflicted upon him stems from that demolition, including the diminution in the property’s value, the necessary costs of restoring or replacing the demolished structures, and his emotional distress.

However, as we pointed out in *Colombo Demurrer 1*, “after the Association completed demolition of the structures on Colombo’s property, it did file a motion to recoup its costs, which the court granted. If Colombo believed the Association’s demolition of the structures had been wrongful and inconsistent with the terms of the injunction, it was incumbent upon him to assert that point *as a defense to the claim for reimbursement*. The trial court’s award of those expenses . . . , necessarily implied a determination the Association acted appropriately in carrying out that demolition in accordance with the injunction.” (*Colombo Demurrer 1, supra*, G047332.)

The same is true here. As the propriety of the demolition was placed at issue when the Association sought reimbursement of the costs incurred in carrying it out, Colombo was required to assert whatever facts and arguments he believed would undermine the Association's claim as a defense to that reimbursement. The issue was resolved in the Association's favor when the trial court awarded it those costs, as well as additional attorney fees, and then ordered the injunction judgment be amended to incorporate those awards.

And because the injunction judgment incorporates a determination that the Association carried out the demolition in accordance with the terms of the injunction, Colombo is precluded from stating any cause of action based on an assertion that the opposite is true – which is what he has attempted to do, for the second time, in this case. Consequently, the trial court did not err in sustaining the Association's demurrer, without leave to amend.

### *3. Other Issues*

Colombo also contends the court erred in granting the Association's special motion to strike the complaint under the anti-SLAPP law. He attacks that ruling both on the merits, and on the basis the court abused its discretion when it denied his motion for permission to take discovery in response to it. We need not address these additional contentions, however, because the trial court's order sustaining the Association's demurrer without leave to amend is sufficient, in and of itself, to sustain the judgment.

III

DISPOSITION

The judgment is affirmed, and the Association is entitled to recover its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.